

Corps Good Faith Efforts to Comply with Conflicting Court Orders

In a July 15, 2003, News Release, the U.S. Army Corps of Engineers reported that the Corps is under two conflicting court orders concerning operation of the Missouri River that are irreconcilable. One order, issued by the U.S. District Court for Nebraska in May 2002 and affirmed by the U.S. Court of Appeals for the 8th Circuit on June 4, 2003, requires the Corps to maintain sufficient flows for navigation as called for under the existing Missouri River Master Manual and the current Annual Operating Plan. An injunction issued by the U. S. District Court for the District of Columbia on July 12, 2003, prohibits the Corps from implementing the summer flows set forth in the 2003 Annual Operating Plan and 2003 Supplemental Biological Opinion.

The Corps has made and continues to make good faith efforts to resolve these conflicting injunctions. After the U.S. District Court for the District of Columbia's order was issued, counsel for the Corps promptly contacted counsel for the State of Nebraska to determine whether Nebraska would consent to a modification of the District of Nebraska's injunction that would allow the Corps to comply with the District Court for the District of Columbia Court's order. Nebraska was unwilling to consent to such a modification and, furthermore, indicated that it would seek a contempt citation if minimum navigation flows were not maintained on the River.

The Corps also immediately asked the U.S. District Court for the District of Columbia to stay the effect of its order and, when that motion was denied, immediately sought a stay from the D.C. Circuit. Because the D.C. Circuit denied the Corps's motion for a stay (late in the afternoon of Friday, July 18, 2003), the Corps has requested the U.S. District Court for Nebraska to modify its order to allow the Corps to comply with the U.S. District Court for the District of Columbia Court's order. Counsel for the Federal Defendants submitted a motion requesting such a modification to the U.S. District Court for Nebraska on Sunday, July 20, 2003, and have asked for expedited review of that motion. In addition, and concurrently with the filing of that motion with the U.S. District Court for Nebraska, the Corps issued a News Release, which notified barge operators, and other users of the Missouri River that flows may be reduced below minimum navigation service.

The above points were made in an argument the morning of July 21, 2003, in support of the Federal defendants opposition to an order to show cause why the Secretary of the Army and the Corps should not be held in contempt by the U.S. District Court for the District of Columbia for failure to comply with that Court's order.